



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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I—03—09

Mr. Matthew J. Frank
Secretary
Department of Natural Resources
101 South Webster Street
Madison, WI 53707

Dear Mr. Frank:

¶ 1. You ask a total of eleven questions and sub-questions concerning riverway zoning ordinances adopted by local units of government under Wis. Stat. § 30.27 and Wis. Admin. Code ch. NR 118. Your questions involve a town that had adopted a county's general zoning ordinance. After the town adopted the county's general zoning ordinance, the town enacted a town riverway zoning ordinance. The county subsequently enacted a riverway zoning ordinance which is effective in the unincorporated areas of the county, including the town. Disagreements have arisen between the town and the county as to the enforceability of their respective riverway zoning ordinances within the town.

¶ 2. I conclude that both counties and towns may enact enforceable riverway ordinances and that the provisions of each ordinance are enforced by the unit of government that created the ordinance. If both a county and a town enact a riverway ordinance, the landowner must comply with the more restrictive ordinance. It is therefore desirable for counties and towns to coordinate the provisions of their riverway ordinances.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 3. I have changed the order of your questions, which are as follows:

[1.a.] Does s. 30.27 permit a county to limit . . . its riverway ordinance to . . . unincorporated municipalities only?

¶ 4. In my opinion, because Wis. Stat. § 59.69(4) limits county zoning jurisdiction to unincorporated areas within a county, a county riverway ordinance enacted under Wis. Stat. § 30.27 and Wis. Admin. Code ch. NR 118 is effective only within unincorporated areas within the Lower St. Croix Riverway.

[1.b.] Does s. 30.27 or ch. NR 118 require that a county adopt a riverway ordinance that identifies and regulates all . . . [five] types of . . . [riverway management zones] . . . specified in ch. NR 118?

¶ 5. In my opinion, a county must adopt a riverway ordinance that identifies and regulates each of the five management zones that are in the unincorporated areas within the Lower St. Croix Riverway found in the county.

[2.] Does s. 30.27 limit a county to enforcement of its riverway ordinance only in those municipalities in that county (incorporated or not), that have not adopted . . . an approved riverway ordinance?

¶ 6. In my opinion, a county's riverway ordinance is enforceable by the county in all towns within the county that are within the Lower St. Croix Riverway, including those towns that have adopted their own riverway ordinances.

[3.a.] Under s. 30.27, is DNR obliged to . . . adopt[] . . . riverway ordinances in towns, villages, cities and counties that have not adopted riverway ordinances under s. 30.27 and ch. NR 118?

¶ 7. In my opinion, the answer is yes if no riverway ordinance is effective within the boundaries of the particular municipality.

[3.b.] Does s. 30.27 . . . [authorize county] enforcement of a county riverway ordinance in . . . [towns] that ha[ve] not adopted a riverway ordinance . . . [or must] DNR . . . [adopt] its own riverway ordinance [for such a town]?

¶ 8. In my opinion, a county's riverway ordinance is enforceable in towns that have not adopted their own riverway ordinances even if a town therein has adopted an approved riverway ordinance. The Department of Natural Resources ("DNR") is not required to adopt a town riverway ordinance if a county riverway ordinance is effective within the boundaries of the particular town and DNR is satisfied with the provisions of the applicable county riverway ordinance.

[4.a.] Does s. 30.27 or ch. NR 118 allow a county to . . . enforce its riverway ordinance in . . . [towns] that ha[ve] [not] adopted . . . DNR-approved riverway ordinance[s], but not enforce its riverway ordinance in . . . [towns] that have adopted approved riverway ordinances?

¶ 9. In my opinion, a county must enforce its riverway ordinance in all unincorporated areas within the Lower St. Croix Riverway even if a town therein has adopted an approved

riverway ordinance. Subject to DNR's approval, a county could enact riverway ordinance provisions coordinating with riverway ordinance provisions enacted by a town.

[4.b.] Would selectively . . . [enforcing] a county riverway ordinance . . . in some . . . [towns], but not other[s] . . . violate equal protection?

¶ 10. Since a county must enforce its riverway ordinance in all unincorporated areas within the Lower St. Croix Riverway, it is unnecessary for me to address this question.

[5.] Under s. 30.27 or ch. NR 118, does a town that has adopted a riverway ordinance approved by DNR . . . [under] ch. NR 118 have sole authority . . . [to] enforce[e] that ordinance within the [t]own's municipal boundaries?

¶ 11. In my opinion, a town has the sole authority to enforce its riverway ordinance. Like all other municipalities, a town with an approved riverway ordinance remains subject to DNR's continuing statutory supervisory authority.

[6.] Does s. 30.27 create . . . different standards for the adoption . . . [or for the] enforcement of local riverway ordinances in incorporated and unincorporated municipalities?

¶ 12. In my opinion, the standards for the adoption of riverway ordinances in incorporated and unincorporated municipalities are the same. In unincorporated areas, town and county riverway ordinances are each enforceable by the municipality that enacted the ordinance. Where there is a conflict between the provisions of two enforceable riverway ordinances, the more restrictive ordinance applies.

[7.a.] May a town that has . . . adopted a DNR-approved riverway ordinance temporarily suspend . . . implementation and enforcement of that . . . ordinance if a [c]ounty . . . [enacts and enforces] its riverway zoning ordinance . . . [within] the [t]own?

¶ 13. In my opinion, any such temporary suspension would require the enactment of an ordinance amendment or modification reviewable by DNR under Wis. Stat. § 30.27(3) and Wis. Admin. Code § NR 118.09(1)(b). It would be inappropriate for this office to speculate as to the outcome of the DNR approval process or to affect the outcome of that process.

[7.b.] Would . . . temporary suspension [of enforcement of a town's riverway ordinance] preclude the [t]own from . . . enforc[ing] . . . its . . . riverway zoning ordinance at a later date?

¶ 14. Since it is not appropriate for this office to speculate as to the outcome of the DNR approval process, it would also be inappropriate to speculate as to whether enforcement of a town riverway ordinance would subsequently be permissible if DNR were to permit a town to temporarily suspend enforcement of the town's riverway ordinance.

**PRINCIPAL STATUTORY AND ADMINISTRATIVE CODE
PROVISIONS INVOLVED**

I. RIVERWAY ZONING STATUTE.

¶ 15. Wisconsin Stat. § 30.27 provides in part:

(2) ZONING GUIDELINES. (a) As soon as possible after May 7, 1974, the department shall adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River. The guidelines shall designate the boundaries of the areas to which they apply. In drafting the guidelines and standards, the department shall consult with appropriate officials of counties, cities, villages and towns lying within the affected area. . . .

. . . .

(3) IMPLEMENTATION. Counties, cities, villages and towns lying, in whole or in part, within the areas affected by the guidelines adopted under sub. (2) are empowered to and shall adopt zoning ordinances complying with the guidelines and standards adopted under sub. (2) within 30 days after their effective date. If any county, city, village or town does not adopt an ordinance within the time limit prescribed, or if the department determines that an adopted ordinance does not satisfy the requirements of the guidelines and standards, the department shall immediately adopt such an ordinance. An ordinance adopted by the department shall be of the same effect as if adopted by the county, city, village or town, and the local authorities shall administer and enforce the ordinance in the same manner as if the county, city, village or town had adopted it. No zoning ordinance so adopted may be modified nor may any variance therefrom be granted by the county, city, village or town without the written consent of the department, except nothing in this section shall be construed to prohibit a county, city, village or town from adopting an ordinance more restrictive than that adopted by the department.

II. RIVERWAY ZONING ADMINISTRATIVE RULES.

¶ 16. Wisconsin Admin. Code § NR 118.02 provides in part:

(2) LOWER ST. CROIX RIVERWAY MANAGEMENT ZONES. Each ordinance enacted or amended by a city, village, town or county within the Lower St. Croix national scenic riverway boundaries shall designate Lower St. Croix riverway management zones in accordance with s. NR 118.04.

(3) LOCAL ZONING ORDINANCES. Counties, cities, villages and towns within the Lower St. Croix national scenic riverway boundaries shall adopt zoning ordinances as required by s. 30.27, Stats., except that a town is not required to adopt an ordinance under this chapter if the county in which the town is located has adopted a local zoning ordinance that applies to the town. Local zoning ordinances adopted pursuant to s. 30.27, Stats., and this chapter may be more, but not less, restrictive than the standards contained in these administrative rules. In no case shall a use or activity allowed by these rules be permitted contrary to local zoning ordinances.

¶ 17. Wisconsin Admin. Code § NR 118.09 provides in part:

Administrative provisions. (1) ADOPTION AND REVIEW OF ORDINANCES. (a) Ordinances implementing the provisions of this chapter shall be adopted by counties, cities, villages and towns located in the Lower St. Croix national scenic riverway within 30 days after November 1, 2004, as required by s. 30.27(3), Stats., except that a town is not required to adopt an ordinance under this chapter if the county in which the town is located has adopted a local zoning ordinance that applies to the town.

(b) Upon adoption of an ordinance, or ordinance amendment, implementing these rules, the local unit of government shall submit 2 copies of the ordinance or amendment to the department. The department shall review the ordinance or amendment and determine whether it satisfies the requirements of this chapter. The department shall notify the local unit of government of its determination.

ANALYSIS

¶ 18. [1.a.] You ask whether Wis. Stat. § 30.27 permits a county to limit its riverway ordinance to unincorporated areas within the county.

¶ 19. A riverway ordinance enacted under Wis. Stat. § 30.27 is a zoning ordinance. Wis. Stat. § 30.27(3). Wisconsin Stat. § 59.69(4) provides that county zoning ordinances are “effective within the areas within such county outside the limits of incorporated villages and cities[.]” County riverway ordinances therefore cannot be effective in the incorporated areas of a county that are within the Lower St. Croix Riverway.

¶ 20. [1.b.] You ask whether a county is required to adopt a riverway ordinance that identifies and regulates all five types of riverway management zones identified in Wis. Admin. Code ch. NR 118.

¶ 21. Wisconsin Admin. Code § NR 118.02(2) specifies that “[e]ach ordinance enacted or amended by a . . . county within the Lower St. Croix national scenic riverway boundaries shall designate Lower St. Croix riverway management zones in accordance with s. NR 118.04.” The word “shall” is mandatory unless a different construction is required to carry out the clear intent of the statute or rule. *See Rutherford v. LIRC*, 2008 WI App 66, ¶ 19, 309 Wis. 2d 498, 752 N.W.2d 897. No such different construction is required. Five geographically identified types of riverway management zones are designated in Wis. Admin. Code § NR 118.04. A county riverway ordinance must therefore identify and regulate each of the five management zones that are in the unincorporated areas within the Lower St. Croix Riverway found in the county.

¶ 22. [2.] You ask whether a county’s enforcement of its riverway ordinance is limited to those incorporated and unincorporated areas within the county that have not adopted riverway ordinances.

¶ 23. As explained in response to your first question, county riverway ordinances are effective only within the unincorporated areas of a county that are within the Lower St. Croix Riverway. Wisconsin Stat. § 59.69(4) provides that county zoning ordinances are enforceable in the unincorporated areas within the county. County enforcement of county riverway ordinances is not statutorily limited to particular towns, regardless of whether such towns have enacted riverway ordinances.

¶ 24. [3.a.] You ask whether DNR is required to adopt riverway ordinances for towns, villages, cities, and counties that have not adopted riverway ordinances.

¶ 25. Wisconsin Stat. § 30.27(3) provides: “If any county, city, village or town does not adopt an ordinance within the time limit prescribed . . . the department shall immediately adopt such an ordinance.” As qualified by the response to your next question, DNR is required to adopt riverway ordinances for those towns, villages, cities, and counties that have not enacted riverway ordinances.

¶ 26. [3.b.] You ask whether Wis. Stat. § 30.27 authorizes the enforcement of a county's riverway ordinance in a town that has not adopted a riverway ordinance and whether DNR must adopt a riverway ordinance for a town in which a county riverway ordinance is enforceable.

¶ 27. As explained in response to your second question, county enforcement of county riverway ordinances is not statutorily limited to particular towns, regardless of whether such towns have enacted riverway ordinances.

¶ 28. DNR has not publicly construed Wis. Stat. § 30.27(3) with respect to the question of whether DNR is required to adopt riverway ordinances for towns in which county riverway ordinances are effective. Wisconsin Stat. § 59.69(4), Wis. Stat. § 30.27, and Wis. Admin. Code ch. NR 118 are related provisions. “[S]tatutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely-related statutes[.]” *Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130, citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The rules of construction that are applicable to statutes are also applicable to administrative rules. *See DaimlerChrysler c/o EIS v. LIRC*, 2007 WI 15, ¶ 10, 299 Wis. 2d 1, 727 N.W.2d 311. If possible, administrative rules should therefore be construed together with related statutes to produce a harmonious whole. *Id.* When construing statutes and administrative rules together, unreasonable and absurd results are to be avoided. *See Orion*, 290 Wis. 2d 421, ¶ 32, citing *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 29. Administrative rules flesh out the meaning of statutes. *See State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 698-99, 517 N.W.2d 449 (1994). In *Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis. 2d 688, 705-06, 457 N.W.2d 879 (Ct. App. 1990), the court explained how to determine whether an administrative rule is a valid enactment:

To “expressly” authorize a rule, the enabling statute need not spell out every detail of the rule. If it did, no rule would be necessary. Accordingly, whether the exact words used in an administrative rule appear in the statute is not the question. Rather, the reviewing court should identify the elements of the enabling statute and match the rule against those elements. If the rule matches the statutory elements, then the statute expressly authorizes the rule.

See, e.g., Mallo v. Wisconsin Dept. of Revenue, 2002 WI 70, ¶¶ 1, 9, 253 Wis. 2d 391, 645 N.W.2d 853. Wisconsin Stat. § 30.27(2) contains broad language directing DNR to “adopt, by rule, guidelines and specific standards for local [riverway] zoning ordinances[.]” Wisconsin Stat. § 30.27(3) provides that if a “county, city, village or town does not adopt an ordinance within the time limit prescribed [in Wis. Admin. Code ch. NR 118],” then DNR must immediately adopt an ordinance which “shall be of the same effect as if adopted by the county, city, village or town[.]” Under Wis. Stat. § 59.69(4), a county riverway ordinance is effective in all towns within the county. Wisconsin Admin. Code § NR 118.09(1)(a) therefore provides that “a town is not

required to adopt an ordinance under this chapter if the county in which the town is located has adopted a local zoning ordinance that applies to the town.” In Wis. Admin. Code § NR 118.09(1)(a), DNR reasonably construed Wis. Stat. § 30.27 together with Wis. Stat. § 59.69(4). Once a county has adopted a riverway ordinance that is effective within a particular town, the town has no reason to adopt its own riverway ordinance if it is satisfied with the provisions of the county riverway ordinance that apply to the town. If DNR were required to adopt a town riverway ordinance in situations where DNR is satisfied with the provisions of the county riverway ordinance that apply to that town, DNR would simply adopt a town riverway ordinance that duplicates those provisions of the county riverway that are effective within the town. The Legislature could not have intended that DNR undertake such a futile exercise. Wisconsin Stat. § 30.27(3) provides:

An ordinance adopted by the department shall be of the same effect as if adopted by the county, city, village or town, and the local authorities shall administer and enforce the ordinance in the same manner as if the county, city, village or town had adopted it.

It is clear from this statutory language that the Legislature’s purpose in requiring DNR to adopt riverway ordinances was to ensure that an enforceable riverway ordinance that meets applicable statutory and regulatory standards was in effect in each municipality. This purpose is fully achieved when the county in which a town is located has adopted an ordinance that DNR has determined meets the “guidelines and specific standards” that are applicable to riverway ordinances under Wis. Stat. § 30.27(2). In my opinion, DNR is not required to adopt a riverway ordinance for a particular town if DNR is satisfied with the provisions of the county riverway ordinance that apply to that town.

¶ 30. [4.a.] You ask whether a county may enforce its riverway ordinance in those towns that have not adopted DNR-approved riverway ordinances, but not enforce the county riverway ordinance in those towns that have adopted DNR-approved riverway ordinances.

¶ 31. Wisconsin Stat. § 30.27(3) indicates that each local unit of government “administer[s] and enforce[s]” its riverway ordinance. A county cannot decline to enforce its riverway ordinance in those towns that have enacted riverway ordinances, but a county could enact riverway ordinance provisions that coordinate with town ordinance provisions. For example, a county could enact riverway ordinance provisions reducing or waiving a fee in situations where a similar fee has been paid to a town. A county could also, for example, enact riverway ordinance provisions expediting the issuance of county permits in cases where a landowner has complied with more restrictive regulatory provisions enacted by a town. Any amendments to a county’s riverway ordinance require DNR approval. Wis. Stat. § 30.27(3); Wis. Admin. Code § NR 118.09(1)(b). Variances from county riverway ordinances also require DNR approval. *See* Wis. Stat. § 30.27(3).

¶ 32. [4.b.] You ask whether a county's selective enforcement of its riverway ordinance in some towns but not others would violate federal and state constitutional provisions that guarantee equal protection of the laws.

¶ 33. Because a county may not selectively enforce its riverway ordinance in some towns and not others, it is unnecessary to address this question.

¶ 34. [5.] You ask whether a town possesses sole authority to enforce its DNR-approved riverway ordinance within the town's boundaries.

¶ 35. Wisconsin Stat. § 30.27(3) indicates that each local unit of government "administer[s] and enforce[s]" its riverway ordinance. A town's riverway ordinance is therefore enforced by only the town itself. As is the case with other municipalities, amendments to a town's riverway ordinance require DNR approval. Wis. Stat. § 30.27(3); Wis. Admin. Code § NR 118.09(1)(b). As is the case with other municipalities, variances from town riverway ordinances also require DNR approval. *See* Wis. Stat. § 30.27(3).

¶ 36. [6.] You ask whether there are different standards for the adoption or enforcement of riverway ordinances in incorporated and unincorporated municipalities.

¶ 37. Wisconsin Stat. § 30.27(3) provides that "[c]ounties, cities, villages and towns lying, in whole or in part, within the areas affected by the guidelines adopted under sub. (2) . . . shall adopt zoning ordinances complying with the guidelines and standards adopted under sub. (2)" The guidelines and standards referred to in Wis. Stat. § 30.27(3) are contained in Wis. Admin. Code ch. NR 118. The standards for adoption of riverway ordinances in all municipalities are the same. All municipal riverway ordinances "may be more, but not less, restrictive than the standards contained in" Wis. Admin. Code ch. NR 118. Wis. Admin. Code § NR 118.02(3).

¶ 38. Both towns and counties may enact riverway ordinances. Wisconsin Stat. § 30.27(3) provides: "Counties, cities, villages and towns lying, in whole or in part, within the areas affected by the guidelines adopted under sub. (2) are empowered to and shall adopt zoning ordinances complying with the guidelines and standards adopted under sub. (2)" As originally enacted, Wis. Stat. § 30.27(3) (1973) provided that "nothing in this section shall be construed to prohibit a county, city, village or town from adopting an ordinance more restrictive than that adopted by the department." Wisconsin Admin. Code § NR 118.09(1)(a) also provides that "a town is not required to adopt an ordinance under this chapter if the county in which the town is located has adopted a local zoning ordinance that applies to the town." The language of the current statute, the language of the original statute, and the language of the rule all indicate that a town may adopt a riverway ordinance even if a county riverway ordinance is effective within the town.

¶ 39. Wisconsin Stat. § 30.27(3) does not require town board approval of county riverway ordinances, nor does it require county board approval of town riverway ordinances. *Compare* 62 Op. Att’y Gen. 264, 265-66 (1973), indicating that town board approval of a county floodplain ordinance could not have been contemplated in part because of the statutory deadline imposed by Wis. Stat. § 87.30. The time constraints for enacting riverway ordinances have also been stringent. Wisconsin Admin. Code § NR 118.07(1)(a), effective July 1, 1980, required towns, counties, and other municipalities to adopt riverway ordinances “within 90 days of the promulgation of these rules.” The current provision, Wis. Admin. Code § NR 118.09(1)(a), effective November 1, 2004, required those towns, counties, and other municipalities that had not adopted riverway ordinances to do so no later than December 1, 2004.

¶ 40. The standards for enforcement of all riverway ordinances are the same. As explained in response to the preceding question, each municipality enforces the provisions contained in its own riverway ordinance. Where there is a conflict between the provisions of two enforceable riverway ordinances, the landowner must comply with the more restrictive ordinance. *Compare* 63 Op. Att’y Gen. 69, 74 (1974), determining that “municipal extraterritorial zoning within shorelands is . . . effective insofar as it is consistent with, or more restrictive than, the county shoreland zoning ordinance.”

¶ 41. [7.a.] You ask whether a town that has adopted a DNR-approved riverway ordinance may temporarily suspend the implementation and enforcement of that ordinance if a county enacts and enforces its own riverway ordinance within the boundaries of the town.

¶ 42. Temporary suspension of a town’s riverway ordinance would require amendment or modification of the ordinance within the meaning of Wis. Stat. § 30.27(3) and Wis. Admin. Code § NR 118.09(1)(b). Those provisions require that DNR approve any suspension or modification of a riverway ordinance. It would be inappropriate for this office to speculate as to the outcome of DNR’s approval process or to affect the outcome of that process. I therefore decline to respond to this question.

¶ 43. Although a town could enact riverway ordinance provisions coordinating with riverway ordinance provisions enacted by a county, no reason is presented as to why a town would consider the temporary suspension of its riverway ordinance once a county riverway ordinance becomes effective within the boundaries of the town. In order to avoid duplication of effort and eliminate multiple requirements, however, a town could give consideration to repealing its riverway ordinance once a county riverway ordinance becomes effective within the town.

¶ 44. [7.b.] You ask whether temporary suspension of the enforcement of a town’s riverway ordinance would preclude the town from enforcing the ordinance at a later date.

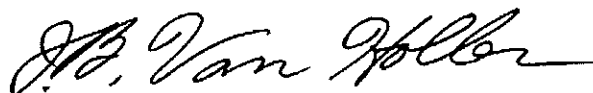
¶ 45. I decline to answer this question for the same reasons that I declined to answer the preceding question. Since it is not appropriate to speculate as to the outcome of the DNR

approval process, it would also be inappropriate to speculate as to whether enforcement of a town riverway ordinance would subsequently be permissible if DNR were to permit a town to temporarily suspend enforcement of the town's riverway ordinance.

CONCLUSION

¶ 46. Counties, cities, villages, and towns within the Lower St. Croix Riverway must enact riverway ordinances. If such ordinances are not enacted, the DNR must enact such an ordinance but the county, city, village, or town must enforce it. County riverway ordinances are effective only within the unincorporated areas of the county that are within the Lower St. Croix Riverway. A county riverway ordinance must identify and regulate each of the five management zones that are in the unincorporated areas within the Lower St. Croix Riverway found in the county. A town must also enact a riverway ordinance that identifies and regulates each of the five management zones that are in the town unless the county has already done so in which case the town does not have to enact such an ordinance but it may. DNR is not required to adopt a town riverway ordinance if a county riverway ordinance is effective within the boundaries of the particular town and DNR is satisfied with the provisions of the applicable county riverway ordinance. If both a county and a town enact a riverway ordinance, the provisions of each ordinance are enforced by the unit of government that enacted the ordinance. Where there is a conflict between the provisions of two enforceable riverway ordinances, the landowner must comply with the more restrictive ordinance. In order to avoid duplication of effort and eliminate multiple requirements, a town could give consideration to repealing its riverway ordinance once a county riverway ordinance becomes effective within the town.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen", with a stylized, flowing script.

J.B. Van Hollen
Attorney General